Filed 2/16/05 Sanai v. U.D. Registry CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CYRUS M. SANAI, Plaintiff and Appellant, v. THE U.D. REGISTRY, INC., et al., Defendants and Appellants.	B170618 (Los Angeles County Super. Ct. No. BC235671)

APPEAL from orders of the Superior Court of Los Angeles County, Elizabeth A. Grimes, Judge. Reversed in part and affirmed in part.

Cyrus Sanai, in pro. per., for Plaintiff and Appellant.

Harvey A. Saltz, in pro. per.; Enenstein, Russell & Saltz and Harvey A. Saltz; Michael J. Saltz, Jason M. Russell, Darren S. Enenstein and Jeffrey R. Glassman for Defendants and Appellants The U.D. Reigstry, Inc., The Irvine Company, Irvine Apartment Communities, LLC, and Irvine Apartment Communities, L.P.

Cyrus Sanai sued The U.D. Registry, Inc. (UDR) and its president Harvey A. Saltz for slander, libel and several other torts and for violation of statutes regulating consumer credit reporting agencies (Civ. Code, § 1785.1 et seq.) based on UDR's negative reports about Mr. Sanai's credit following a dispute between Mr. Sanai and his landlord over the amount of rent due for an apartment Mr. Sanai had leased in Newport Beach. Mr. Sanai's lawsuit was subsequently amended to name Irvine Apartment Communities, L.P., Irvine Apartment Communities, LLC, and The Irvine Company (collectively "Irvine Entities"), the owners of the apartment Mr. Sanai had leased, as defendants in a cause of action for breach of contract. UDR cross-claimed against Mr. Sanai for breach of contract as assignee for the Irvine Entities to collect the allegedly unpaid rent (approximately $2,800).

After protracted litigation a final judgment of dismissal was entered, disposing of all causes of action among the parties. The trial court thereafter awarded costs to UDR and the Irvine Entities and attorney fees to UDR under the Consumer Credit Reporting Agencies Act (Civ. Code, § 1785.31, subd. (e)). Mr. Sanai appeals the award of costs and fees; UDR and the Irvine Entities cross-appeal the trial court's denial of additional fees pursuant to the attorney fee provision in the original lease agreement signed by Mr. Sanai. We conclude UDR and the Irvine Entities are not entitled to either costs or attorney fees in this matter.

FACTUAL BACKGROUND

As we have observed in connection with the prior appellate proceedings in this case,[1] the relevant facts are essentially undisputed: Mr. Sanai rented an apartment in a

---

[1] In *Sanai v. The U.D. Registry, Inc.* (Mar. 21, 2002, B147392) [nonpub. opn.] (*Sanai I*), we affirmed the denial of UDR's special motion to strike pursuant to Code of Civil Procedure section 425.16 and dismissed as moot the denial of Mr. Sanai's request for a preliminary injunction. In *Sanai v. The U.D. Registry, Inc.* (Sept. 11, 2002, B152745) [nonpub. opn.] (*Sanai II*), we dismissed Mr. Sanai's appeal from three trial court orders directing him to pay monetary sanctions because the orders were not appealable. Mr. Sanai's effort to cure this jurisdictional defect through a motion to augment the record was unsuccessful because the additional orders he provided, a minute

Newport Beach apartment complex known as Promontory Point, owned by the Irvine Entities, from August 26, 1997 through January 1999. After the expiration of the original, six-month lease, Mr. Sanai continued to occupy the apartment on a month-to-month basis at a rent of $2,165.[2] In September 1998 Mr. Sanai received a letter dated August 31, 1998 from a representative of the Irvine Entities stating a new monthly rent of $1,435 was being established for his apartment and offering him "the option to renew a minimum of a 6-month up to a 12-month lease, at the monthly rent of $1,410 effective October 1, 1998." A second copy of this letter was taped to Mr. Sanai's door a few days after he had received the original by mail. Mr. Sanai responded on October 1, 1998 with a letter of acceptance for a 12-month lease, enclosing a rent check of $1,410 for October 1998.

---

order reflecting a request for dismissal of the cross-complaint and an order granting a motion for judgment on the pleadings without leave to amend, were similarly interlocutory and nonappealable.

Because of his default under California Rules of Court, rule 8(b), in *Sanai v. Saltz* (Dec. 17, 2002, B156672) (*Sanai III*), we dismissed Mr. Sanai's appeal from various orders adversely determining his claims against UDR and the Irvine Entities and imposing sanctions against him. After the notice of appeal had been filed in *Sanai III* but before we dismissed the appeal, Mr. Sanai successfully moved in the trial court for final judgments to be entered against him on the basis of orders and dismissals at issue in the then-pending *Sanai III* appeal. In *Sanai v. Saltz* (Jan. 20, 2004, B163221) [nonpub. opn.] (*Sanai IV*), we affirmed the final judgments entered at Mr. Sanai's request, holding our dismissal in *Sanai III* had affirmed the orders, rulings and findings at issue in that appeal, as well as the judgment entered during the pendency of the appeal based on those orders. Because our dismissal did not expressly provide it was made without prejudice to the right of Mr. Sanai to take another appeal, a further appeal again challenging the same judgment and orders was barred.

[2] Paragraph 29 of the August 26, 1997 lease agreement provides, "Upon the expiration of the Term of this Lease, but not upon the earlier termination hereof, this Lease shall continue as a tenancy from month to month unless either party has given written notice to the other prior to thirty (30) days before the expiration of the term of its election that such month to month tenancy shall not commence. . . . In the event this Lease shall continue as a tenancy from month to month, as provided above, each of the terms and conditions of the Lease shall apply with respect to such tenancy . . . ."

Within a day of Mr. Sanai's acceptance of the offer set forth in the August 31, 1998 letter, a representative of Irvine Entities informed Mr. Sanai the monthly rental amount was a misprint and advised him the offer was rescinded. Mr. Sanai (a transactional lawyer) responded that he had accepted the offer and the contract was binding.[3] Further discussions between Mr. Sanai and representatives of the Irvine Entities did not resolve the dispute. In December 1998 the Irvine Entities posted a three-day notice to quit on Mr. Sanai's door. Mr. Sanai moved out of the Promontory Point apartment complex in January 1999.

From October 1, 1998 through the time he left his Newport Beach apartment, Mr. Sanai paid rent at the rate of $1,410 per month. In February 1999, after Mr. Sanai had moved, a representative of the Irvine Entities contacted Mr. Sanai and demanded he pay back rent in the amount of $2,781; Mr. Sanai refused. Each party threatened the other with legal action. Mr. Sanai's suggestion that both sides simply drop their claims was rejected.

The Irvine Entities filed no legal action to enforce its claim for unpaid rent against Mr. Sanai and apparently did not assign the debt to a collection agency. However, they did retain UDR and Mr. Saltz in April 1999 to inform consumer credit reporting agencies of their claim against Mr. Sanai.

In January 2000 Mr. Sanai applied for and was denied a low-interest credit card from American Express due to information from a credit-reporting agency that a debt had been sent to collection. Citibank subsequently declined Mr. Sanai's request to increase his credit-line limit for the same reason. Mr. Sanai obtained a copy of his credit report,

---

[3] In papers filed in support of his motion for a preliminary injunction, Mr. Sanai acknowledged that he initially believed the August 31, 1998 letter contained a typographical error, but declared that, after he received the second letter taped to his apartment door and considered news reports regarding the worldwide financial crisis that was then occurring, he concluded the amounts of rent in the letters were correct and the apartment owners were seeking to retain their better tenants by unilaterally offering to lower the rent. Mr. Sanai maintained he was not aware of any mistake made by the Irvine Entities.

which listed an item from UDR stating a collection account was past due for unpaid rent with the Irvine Entities. Mr. Sanai then requested that UDR and Mr. Saltz insert in its reports additional information about Mr. Sanai's dispute with the Irvine Entities pursuant to Civil Code section 1785.16. According to Mr. Sanai's second amended complaint, the operative pleading in this action, UDR did not include in its reports sent to third parties the text he had requested.

PROCEDURAL HISTORY

In September 2000 Mr. Sanai filed a complaint against UDR and Mr. Saltz alleging causes of action for slander, libel, intentional and negligent interference with prospective economic advantage, intentional and negligent infliction of emotional distress, violations of the Consumer Credit Reporting Agencies Act (Civ. Code, § 1785.1 et seq.) and violation of the federal Fair Credit Reporting Act (15 U.S.C. § 1681s-2). The complaint sought in excess of $5 million in damages.

1. *UDR's Special Motion to Strike the Complaint*

After answering the complaint, UDR filed a special motion to strike under Code of Civil Procedure section 425.16,[4] asserting Mr. Sanai's lawsuit was brought in retaliation for UDR's exercise of its constitutional right to petition or engage in speech related to a matter in litigation.[5] UDR argued that, because Mr. Sanai's debt to the Irvine Entities was detailed in the three-day notice to pay rent or quit, which had been served on him as

---

[4] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

[5] Section 425.16 -- the anti-SLAPP statute -- provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) However, a defendant "moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding [under clauses (1) and (2) of section 425.16, subdivision (e),] need *not* separately demonstrate that the statement concerned an issue of public significance." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

a prerequisite to eviction proceedings, its actions in reporting that alleged debt to the major credit bureaus was speech made in connection with an issue under consideration or review by a judicial body within the meaning of section 425.16, subdivision (e)(2).[6] The trial court denied the motion, concluding that UDR had failed to make the required threshold showing that the challenged causes of action arose from protected activity within the ambit of section 425.16, subdivision (e).[7]

UDR immediately appealed the trial court's order denying its special motion to strike. (§ 425.16, subd. (j).) Two weeks later, UDR also filed a petition for writ of mandate to vacate the trial court's order denying its motion and requested that this court immediately stay all trial court proceedings, arguing its right to appeal the trial court's order was not an adequate remedy.[8] UDR, however, did not seek a stay of the trial court proceedings by petition for a writ of supersedeas ancillary to its appeal. (See *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 455.)

We summarily denied the petition for writ of mandate and request for stay of proceedings on February 9, 2001 and ultimately affirmed the trial court's denial of UDR's special motion to strike, holding that "for the official proceeding in section

---

[6] A cause of action arising out of the defendant's "litigation activity" directly implicates the right to petition and thus is subject to a special motion to strike. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89; *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 237-238.)

[7] Because the trial court held UDR had failed to make the threshold showing that the challenged causes of action arose from protected activity, the court did not consider whether Mr. Sanai had demonstrated a probability of prevailing on his claims. UDR argued Mr. Sanai could not make the required showing because all of its conduct was absolutely protected by the litigation privilege. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [once the defendant establishes § 425.16 applies, the burden shifts to the plaintiff to demonstrate a "reasonable probability" of success on the merits].)

[8] In its writ petition UDR asserted, "[B]ecause the appeal process is extraordinarily lengthy, and because the purpose of the statute is to arrest SLAPPs at the outset, there can be no meaningful remedy under the statute unless the Order is immediately reversed and the action is stayed."

425.16, subdivision (e), clauses (1) and (2), to be 'equated' with a public issue, there must be an actual official proceeding to which the conduct at issue can be connected. If there was no actual official proceeding, there was no public issue to which the conduct can be connected, and the conduct should not fall within the protection of section 425.16, subdivision (e), clauses (1) and (2)." (*Sanai I*, *supra,* B147392 at p. 19.)

2. *Further Proceedings in the Trial Court*

While *Sanai I* was pending, from January 25, 2001, to May 24, 2002, the trial court issued a number of rulings and orders without any formal objection by either party to the trial court continuing to act in the case. (*Sanai I, supra*, B147392 at p. 10, fn. 6.) In one of those rulings the trial court held Mr. Sanai's landlord was a necessary and indispensable party to the action. As a result, Mr. Sanai filed a first amended complaint and thereafter a second amended complaint adding the Irvine Entities as defendants and asserting a cause of action against Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC for breach of a written lease agreement (the purported agreement to lease the apartment for 12 months at a monthly rental of $1,410 beginning October 1, 1998).[9] UDR, as assignee of the Irvine Entities, filed a cross-complaint to collect the disputed unpaid rent.

On October 18, 2001 the trial court sustained UDR's demurrer to the first seven causes of action in the second amended complaint without leave to amend. The court ruled that the second amended complaint did not allege UDR had wrongfully reported a

---

[9] Mr. Sanai's second amended complaint alleged nine causes of action for slander, libel, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, intentional infliction of emotional distress, negligent infliction of emotional distress, violation of Civil Code section 1785.1, et seq. (reports made *to* a consumer credit reporting agency), violation of Civil Code section 1785.16 (reports made *by* a consumer credit reporting agency) and breach of written contract. The first seven causes of action named UDR, Mr. Saltz and the Irvine Entities as defendants; only UDR was named as a defendant in the eighth cause of action; Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC were the only defendants named in the ninth cause of action for breach of written contract.

false debt; indeed, according to Mr. Sanai's allegations, UDR had fully complied with Civil Code section 1785.25, subdivision (c), which requires that, if a debt is subject to a continuing dispute, any information about that debt submitted to a credit reporting agency must include a notice that the information is disputed by the consumer. Judgment on the pleadings in favor of Mr. Saltz and the Irvine Entities on those same seven causes of action was granted by the trial court on December 21, 2001 based on the court's earlier ruling on UDR's demurrer to the second amended complaint. A final judgment of dismissal was thereafter entered as to The Irvine Company and Mr. Saltz on March 8, 2002.

The eighth cause of action in the second amended complaint, the only remaining claim against UDR, was resolved against Mr. Sanai on February 13, 2002 when the trial court granted UDR's motion for summary adjudication, concluding UDR had not published Mr. Sanai's consumer credit report during the time periods alleged in the second amended complaint, an element of the claim for violation of Civil Code section 1785.16. On March 26, 2002 the trial court granted the motion for judgment on the pleadings filed by Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC on the last claim in Mr. Sanai's lawsuit, the ninth cause of action for breach of contract. The trial court ruled Mr. Sanai's attempt to accept the offer for a one-year lease at $1,410 was ineffective because the written offer (even assuming no mistake in the price term) required acceptance no later than September 30, 1998, while Mr. Sanai's letter of acceptance was dated October 1, 1998.[10] The trial court entered a final order of dismissal as to Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC on April 2, 2002. Mr. Sanai served a combined written notice of

---

[10] The trial court also ruled that Mr. Sanai was attempting only to enforce a one-year lease for the apartment at a monthly rent of $1,410, not a month-to-month tenancy at $1,435 per month. Mr. Sanai does not dispute that he paid only $1,410 for each month he remained in the apartment after October 1, 1998.

entry of final judgment and final orders of dismissal as to all the Irvine Entities and Mr. Saltz on April 13, 2002.[11]

After all of the causes of action in Mr. Sanai's second amended complaint had been dismissed and a trial date set for UDR's cross-complaint to collect unpaid rent, Mr. Sanai made a statutory tender of the full amount sought by UDR (whether this offer was prompted by the trial court's statement it would entertain a motion for terminating sanctions as a result of Mr. Sanai's failure to comply with discovery orders or was independently prompted by tactical considerations is disputed by the parties). UDR accepted the offer and dismissed its cross-complaint in May 2002.

Final judgment was entered in the case on September 17, 2002. Notice of entry of judgment was served on September 24, 2002.

3. *The Award of Costs and Attorney Fees*

UDR and the Irvine Entities filed both a joint memorandum of costs and a consolidated motion for attorney fees on November 25, 2002. Mr. Sanai moved to strike the costs memorandum as to all parties as untimely under California Rules of Court, rule 870(a)(1);[12] he opposed the attorney fee motion on the merits and also argued as to the Irvine Entities the motion was untimely. On December 31, 2002 UDR and the Irvine

---

[11] Mr. Sanai apparently did not file a copy of the combined notice of entry. Although that failure may be a breach of professional etiquette, it does not in any way vitiate the triggering effect of service of the notice of entry for making and determining posttrial motions. (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1279-1280 ["Counsel who has served notice of entry of judgment *should* thereafter promptly file a copy of the served document together with a proof of service. Although not statutorily required, the act of filing those documents ensures that the date on which the notice of entry was served, thereby triggering the statutory periods for making and determining posttrial motions, appears of record in the superior court file."].)

[12] California Rules of Court, rule 870(a)(1) provides, "A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment . . . ." Rule 870(b)(3) authorizes the court to extend the time for serving and filing the costs memorandum "for a period not to exceed 30 days." References to a rule or rules are to the California Rules of Court.

Entities withdrew their memorandum of costs and concurrently filed a motion for relief under section 473, subdivision (b), requesting leave to file the costs memorandum late and asserting that the delay in filing had resulted from attorney mistake, inadvertence, surprise or neglect.[13]

After hearing argument on January 30, 2003, the trial court permitted the late filing of the costs memorandum, although it rejected UDR and the Irvine Entities' assertion they were entitled to mandatory relief because of attorney fault, and awarded $7,248.60 in costs. The court denied the request for attorney fees under the attorney fee provision in the lease agreement, but found UDR was entitled to attorney fees under Civil Code section 1785.31, subdivision (e), which authorizes the award of fees to a limited class of successful defendants in actions under the Consumer Credit Reporting Agencies Act (actions against "debt collectors" related to the collection of a debt) if the lawsuit was not brought in good faith. The court awarded UDR $136,034 in fees, 25 percent of the total fees sought by all defendants in their consolidated attorney fee motion.

Mr. Sanai filed a timely notice of appeal challenging the award of costs and attorney fees. UDR and the Irvine Entities filed a timely cross-appeal from the order denying their request for fees pursuant to the attorney fee provision in the lease agreement.

CONTENTIONS

Mr. Sanai contends all of the trial court's rulings and orders from January 19, 2001 to May 24, 2002 are void because the action was automatically stayed during the pendency of UDR's appeal of the denial of its special motion to strike and, as a result, the postjudgment order awarding costs and attorney fees is similarly void. He also contends the trial court erred in granting relief to permit the late filing of the memorandum of costs

---

[13] Invoking the mandatory relief provision of section 473, subdivision (b), Jason M. Russell, counsel for UDR and the Irvine Entities, submitted a declaration explaining that he had mistakenly calendared the time to file the memorandum of costs as 60 days, rather than 15 days, from the date of service of the notice of entry of final judgment.

and awarding UDR attorney fees under Civil Code section 1785.31, subdivision (e), because UDR is not a "debt collector." UDR and the Irvine Entities contend the trial court erred in denying attorney fees pursuant to the fee provision in the lease agreement between Mr. Sanai and the Irvine Entities.[14]

DISCUSSION

1. *Orders Made by the Trial Court During the Automatic Stay Period Are Not Void*

Three months after we filed our decision in *Sanai I*, Division Four of this court in *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1189-1190 (*Mattel*), in a case of first impression,[15] held perfection of an appeal from the denial of a special motion to strike automatically stays proceedings in the trial court pending outcome of the appeal. Because the special motion to strike, and therefore the appeal of its denial, embraced the entire action and not simply one of several independent causes of action, the automatic stay similarly applied to the entire lawsuit. "Thus, the trial court was divested of jurisdiction upon perfection of the appeal and it acted in excess of jurisdiction by setting a trial date." (*Id*. at p. 1190.)

Based on the holding of *Mattel* and Division Four's statement that the trial court was "divested of jurisdiction" by virtue of the automatic stay, Mr. Sanai asserts that all of the rulings and orders made by the trial court in this case from January 19, 2001 to May 24, 2002 during the pendency of UDR's appeal of the denial of its special motion to

---

[14] The parties raise a wide variety of additional issues, some of which are not properly presented on this appeal and none of which is necessary to our decision. To the extent we have not discussed every case or fact cited in support of their positions, we remind the parties an appellate opinion "is not a brief in reply to counsel's arguments." (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263.)

[15] The trial court in *Mattel* had initially issued an order staying the action after it denied the special motion to strike, but later vacated the stay with the intent to proceed to trial. Division Four heard argument on the appellants' petition for supersedeas "because no reported case has yet directly addressed whether an automatic stay results when the moving party appeals from denial of a special motion to strike." (*Mattel, supra*, 99 Cal.App.4th at p. 1189.)

strike are void and that, as a result, the award of costs and attorney fees based on the void orders and judgment are similarly void.[16] Mr. Sanai's argument raises two related questions: First, did the *Mattel* court correctly hold that an appeal from the denial of a special motion to strike under section 425.16 effects an automatic stay of the trial court proceedings? Second, if proceedings in the trial court are stayed and the court nonetheless proceeds with the case without objection from any party, are the actions of the trial court void or does the parties' participation waive any irregularity or defect in the proceedings?

The first question -- does an appeal from denial of a special motion to strike automatically stay proceedings in the trial court -- is currently pending before the Supreme Court. (*Varian Medical Systems, Inc. v. Delfino*, review granted March 3, 2004, S121400.) Oral argument was heard in the *Varian Medical* case in December 2004, and the Court's answer to this question should be known within the next several months.[17]

---

[16] Mr. Sanai raised this argument in *Sanai III*, which we dismissed for his failure to comply with rule 8(b), and attempted to raise it again in *Sanai IV*, in which we affirmed the judgment and orders on appeal solely on the ground Mr. Sanai was impermissibly seeking a second appeal from the same orders that had been at issue in *Sanai III*. (See fn. 1, above.) In neither appeal did we reach the merits of Mr. Sanai's argument that the orders and final judgment were void. Accordingly, even if the law of the case doctrine might otherwise preclude consideration of this question, it is simply inapplicable in the case at bar. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 492 [law of the case doctrine inapplicable if issue not a "ground of the decision" in the prior appellate case]; see *Davies v. Krasna* (1975) 14 Cal.3d 502, 507 [under the law of the case doctrine, "a matter adjudicated on a prior appeal normally will not be relitigated on a subsequent appeal in the same case"].)

[17] Our own review of the legislative history of the 1999 amendment adding subdivision (j) to section 425.16 to authorize an immediate appeal from an order granting or denying a special motion to strike (Stats. 1999, ch. 960, § 1) persuades us that Division Four correctly held in *Mattel, supra*, 99 Cal.App.4th 1179, that an appeal from the denial of a special motion to strike under section 425.16 effects an automatic stay of the trial court proceedings pursuant to section 916, subdivision (a) ("perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby . . . ."). While the proposed amendment was under consideration, the Senate Rules Committee explained that, if the amendment was

We need not defer our decision in this case, however, because even if trial court proceedings were subject to an automatic stay, having failed to properly object on this ground in the trial court, Mr. Sanai cannot now challenge any rulings and orders made while UDR's appeal was pending.[18]

In *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, we explained the difference between acts taken by the superior court when it lacked jurisdiction in a fundamental sense and acts in excess of the jurisdiction of the court, which, although unauthorized, are subject to principles of consent and waiver: "'Lack of jurisdiction' is a term used to describe situations in which a court is without authority to act. [Citation.] In its most fundamental or strict sense, 'lack of jurisdiction' means an entire absence of power to hear or determine the case, i.e., an absence of authority over the subject matter or the parties. [Citation.] 'Lack of jurisdiction' is also applied more broadly to a situation where, though the court has jurisdiction over the subject matter and the parties in a fundamental sense, it has no power to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. [Citation.] Thus, acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are described as acts in 'excess of jurisdiction.' [Citations.]" (*Id.* at p. 1040.) """While the fundamental type of jurisdiction can never be conferred by consent of the parties, the latter type [acts

---

adopted, any appeal from the trial court's ruling on a special motion to strike would result in an automatic stay: "This bill would provide that an order granting or denying a special motion to strike shall be immediately appealable, and therefore, the perfecting of the appeal would stay proceedings in the trial court." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1675 (1999-2000 Reg. Sess.) Sept. 2, 1999, p. 3.)

[18] Obviously, if the Supreme Court were to rule that an appeal of the denial of a special motion to strike does not effect an automatic stay of trial court proceedings, Mr. Sanai's challenge to the orders made during the pendency of UDR's appeal would be moot.

in 'excess of jurisdiction'] is often subject to principles of consent and waiver."' [Citation.]" (*Id.* at p. 1041; accord, *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 661 ["When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until set aside, and a party may be precluded from setting it aside by 'principles of estoppel, disfavor of collateral attack or res judicata.' [Citation.]")

A stay of trial court proceeding during the pendency of an appeal, whether effected automatically or by special court order, does not deprive the trial court of jurisdiction in the fundamental sense: The court maintains jurisdiction over the subject matter of the action and the parties before it.[19] Indeed, the trial court expressly retains the power to proceed upon other matters "embraced in the action and not affected by the [appealed] judgment or order." (§ 916, subd. (b).) Accordingly, actions by the trial court during the pendency of such a stay, while in excess of its jurisdiction and therefore "voidable," are not void. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 27 [party may waive objection to trial court action during pendency of stay by appearing and arguing merits of motion]; see *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629 ["trial court proceedings in contravention of the section 916 stay are *in excess of the court's jurisdiction* . . . ." (italics added)]; *Mattel, supra*, 99 Cal.App.4th at p. 1190 ["the trial court was divested of jurisdiction upon perfection of the appeal and it acted *in excess of jurisdiction* by setting a trial date" (italics added)].)

In *Mann v. Cracchiolo, supra,* 38 Cal.3d 18, the plaintiffs had filed a petition for extraordinary relief in the Court of Appeal challenging the trial judge's refusal to disqualify himself in the action pending before him in the superior court. The appellate court issued a temporary stay: "'In order that this court may have an opportunity to

---

[19] "The purpose of the rule depriving the trial court of jurisdiction during the pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it." (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

consider [the] within petition, IT IS HEREBY ORDERED that all proceedings . . . are stayed pending determination of the within petition or until further order of this court.'" (*Id.* at p. 26.) While that stay was in place, the defendants moved for summary judgment; the plaintiffs immediately filed a petition for writ of prohibition to prevent a hearing on the summary judgment motion, arguing that the motion violated the stay. The Court of Appeal then denied the petition for extraordinary relief and lifted the temporary stay; and the trial court, after refusing to grant a continuance, proceeded to hear the summary judgment motion as originally scheduled. (*Ibid*.) Assuming the filing of the summary judgment motion violated the stay,[20] the Supreme Court held the plaintiffs had waived any error in the trial court proceedings: "Plaintiffs chose to appear and argue the merits of the summary judgment motions and did not challenge the filing of the motions at the hearing of the motions. 'It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion. [Citations.]' [Citations.]" (*Id*. at p. 27.)

Like the plaintiffs in *Mann v. Cracchiolo, supra*, 38 Cal.3d 18, Mr. Sanai chose to appear and argue the merits of various motions in the trial court while, under the holding of *Mattel, supra*, 99 Cal.App.4th 1179, an "automatic" stay was in place to protect our jurisdiction while deciding UDR's appeal of the trial court's order denying its special motion to strike. Having done so, Mr. Sanai has waived any right to now argue that the stay rendered the resulting orders and judgment void.

2. *The Irvine Entities' Memorandum of Costs and Motion for Attorney Fees Were Untimely*

Rule 870(a) requires a prevailing party who claims costs to serve and file a memorandum of costs within 15 days after either the date of mailing of the notice of

---

[20] The Supreme Court concluded it need not reach the "interesting question" whether the Court of Appeal's stay of "all proceedings" should be read as referring only to actions by the court or as including actions by the parties, as well. (*Mann v. Cracchiolo, supra,* 38 Cal.3d at p. 27.)

entry of judgment or dismissal by the clerk or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of the judgment or dismissal order, whichever is first. Rule 870.2(b)(1) requires a party who claims attorney fees for services through rendition of judgment in the trial court to serve and file a motion for attorney fees "within the time for filing a notice of appeal under rules 2 and 3" -- that is, within the earliest of 60 days after either the date of mailing of the notice of entry of judgment or dismissal (or other appealable order) or a file-stamped copy of the judgment or dismissal by the clerk or the date of service of written notice of entry of judgment or dismissal by a party, or within 180 days after entry of the judgment or dismissal or other appealable order unless those dates are extended by the timely filing of a valid motion for new trial, motion to vacate judgment or motion for judgment notwithstanding the verdict.

On December 21, 2001 the trial court granted the Irvine Entities motion for judgment on the pleadings on the first seven causes of action in Mr. Sanai's second amended complaint. The Irvine Company was not a named defendant in the two remaining causes of action, and a final judgment of dismissal (more properly denominated an order of dismissal) was entered as to it on March 8, 2002. The dismissal of The Irvine Company was a final appealable order. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437 ["'It is settled that the rule requiring dismissal [of the entire lawsuit] does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party. [Citations.]' [Citations.]"]; see *Daar v. Yellow Cab Co*. (1967) 67 Cal.2d 695, 699 ["'order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment'"]; *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1120, fn. 1.)

On March 26, 2002 the trial court granted the motion for judgment on the pleadings filed by Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC as to the ninth cause of action for breach of contract, the only remaining claim in the lawsuit against them. At Mr. Sanai's request, a final order of

dismissal as to Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC was entered on April 2, 2002. A combined written notice of entry of final orders of dismissal as to all the Irvine Entities was served by Mr. Sanai on April 13, 2002. Like the order dismissing The Irvine Company, the final order of dismissal as to Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC was a final appealable order.

Pursuant to rules 870(a) and 870.2(b)(1) the Irvine Entities had 15 days from April 13, 2002 to file their memorandum of costs and 60 days from April 13, 2002 to move for attorney fees. Their costs memorandum and motion for attorney fees, however, prepared jointly with UDR, were not served and filed until November 25, 2002, 60 days after service of the notice of entry of final judgment against all parties.[21] Moreover, although a motion for relief under section 473, subdivision (b), to permit the late filing of the memorandum of costs was filed on behalf the Irvine Entities -- discussed in the following section of this opinion -- no such relief was ever requested with respect to their motion for attorney fees. The Irvine Entities' attorney fee motion, therefore, was untimely. (*Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1727-1729 [rule 870.2's procedural requirements regarding the filing of a timely motion are mandatory; the trial court cannot disregard a party's noncompliance unless it determines the noncomplying party is entitled to relief under § 473].)

The Irvine Entities seek to avoid the conclusion their motion for attorney fees should have been denied as untimely by asserting that in *Sanai II* this court determined the orders of dismissal in this case were not appealable until the trial court entered its final judgment of dismissal as to all parties on September 17, 2002; and, therefore, their time to file the motion also began to run only on September 17, 2002. The premise for

---

[21] Even if Mr. Sanai had not served a written notice of entry of final judgment and orders of dismissal, the deadline for filing the memorandum of costs and motion for attorney fees was September 4, 2002 for The Irvine Company and September 30, 2002 for Irvine Apartment Communities, L.P. and Irvine Apartment Communities, LLC -- 180 days after entry of the respective orders of dismissal.

this argument is incorrect: In *Sanai II* we held only that neither a minute order reflecting a request for dismissal of the cross-complaint nor an order granting a motion for judgment on the pleadings without leave to amend was itself an appealable order of dismissal. (*Sanai II, supra*, B152745 at p. 3, fn. 2.)

The decision of Division Five of this court in *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, reversing an award of costs and fees because the prevailing party had failed to timely file their costs memorandum and motion for attorney fees, confirms our conclusion that the Irvine Entities' motion for attorney fees is not timely. In *Sanabria* the plaintiff had voluntarily dismissed his complaint against the initial defendants in the action, resolving all claims involving them, while a complaint-in-intervention and cross-complaint were still pending between the plaintiff and a third party. A notice of entry of dismissal was served and filed. Division Five first held the dismissal was proper. (*Id*. at p. 425 ["Sanabria voluntarily dismissed only his complaint against the Embreys. This was proper, regardless of the pending complaints between Sanabria and Scherer. The dismissal was effective as to the Embreys immediately, thus terminating the action as to them."].) It then held, although the voluntary dismissal was not appealable, service of notice of entry of the dismissal triggered the 15-day and 60-day deadlines for filing a memorandum of costs and motion for attorney fees by the dismissed defendants. "Although a voluntary dismissal is generally not appealable, it is nevertheless effectively a 'judgment' within the meaning of California Rules of Court, rule 2(a). [Citations.] Accordingly, we conclude California Rules of Court, rule 870.2 governs, and the time for filing a motion for attorney fees commences upon service of notice of entry of dismissal." (*Id*. at p. 427.) By like measure, the Irvine Entities' time for filing a motion for attorney fees commenced on April 13, 2002, upon service by Mr. Sanai of the combined notice of entry of dismissal.[22] Accordingly, because their motion for attorney fees was untimely, we affirm in all respects the trial court's denial of fees to the Irvine Entities.

---

[22] The suggestion the holding in *Sanabria v. Embrey, supra*, 92 Cal.App.4th 422, is limited to voluntary dismissals from which there is no right of appeal, and therefore does

3. *The Trial Court Erred in Granting UDR's and the Irvine Entities' Motion for Relief Under Section 473, Subdivision (b), and Permitting Recovery of Costs After They Failed to Timely File the Memorandum of Costs*

Because notice of entry of judgment was served by mail on September 24, 2002, UDR had until October 14, 2002 to file its memorandum of costs: 15 days pursuant to rule 870(a)(1) (costs memorandum must be served and filed within 15 days after service of notice of entry of judgment or dismissal), extended by an additional five days because service was by mail. (§ 1013, subd. (a); *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 649.) As discussed in the preceding section of this opinion, because of the earlier entry of final appealable orders of dismissal as to the Irvine Entities, their memorandum of costs was due at a substantially earlier date. Nonetheless, a consolidated memorandum of cost for all prevailing defendants was not filed until November 25, 2002.[23]

After Mr. Sanai moved to strike the costs memorandum, UDR and the Irvine Entities filed a motion for relief under section 473, subdivision (b), arguing their failure to timely file the costs memorandum "was the result of Defendants' counsel's mistake, inadvertence, surprise or excusable neglect of Plaintiffs' [*sic*] counsel and any default

---

not apply in this case because Mr. Sanai could appeal from the final orders of dismissal entered in favor of the Irvine Entities, even if otherwise intelligible, is belied by the analysis in *Sanabria* itself: "The State Bar had proposed language that [would] require a motion for attorney fees to be filed within 60 days after the 'date of service of written notice of entry of judgment or dismissal.' The Administrative Office of the Courts proposed language incorporating the time requirements for filing a notice of appeal, believing such language to be equivalent . . . . [¶] It is therefore clear that California Rules of Court, rule 870.2 provides time limits for motions for attorney fees in all civil cases, and its 60-day time limit commences to run at notice of entry of judgment or dismissal. Any other interpretation would be irrational and thwart the rulemaker's intent." (*Id*. at p. 429.)

[23] According to a comment made at the January 30, 2003 hearing on the issue of costs, a request to extend time for filing the costs memorandum was denied on November 21, 2002 for failure to demonstrate good cause. Although the record on this appeal is extensive, neither side has provided us with a copy of this request or the court's ruling.

resulting there from [*sic*] must be set aside as a matter of law." In a declaration accompanying the moving papers, Jason M. Russell, counsel for UDR and the Irvine Entities, explained his error: "I calendared the time to file Defendants' Memorandum of Costs on the mistaken pretext that said Memorandum of Costs had to be filed within 60 days from service of the Notice of Entry of Final Judgment of Dismissal. This honest mistake was due to my error in calculating the time limit Defendants may seek costs on appeal versus the time Defendants may seek prejudgment costs."[24]

The time limit for filing a memorandum of costs, like the deadline for filing a motion for attorney fees, is mandatory; failure to timely file and serve a cost bill waives the party's entitlement to costs. (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929 ["The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory."].) Nonetheless, as the trial court recognized in this case, the court has discretionary power to grant relief from that waiver under section 473, subdivision (b): "In the absence of prejudice, the trial court has broad discretion in allowing relief on grounds of inadvertence from a failure to timely file a cost bill." (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 381; see *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1192-1193; *Douglas v. Willis* (1994) 27 Cal.App.4th 287, 290.)

UDR and the Irvine Entities' motion for relief was grounded solely on the mandatory relief provision of section 473, subdivision (b), which provides that, upon a showing by attorney declaration of "mistake, inadvertence, surprise, or neglect," the trial court shall vacate any "resulting default judgment or dismissal entered." (§ 473, subd. (b).)[25] Waiver of the right to recover trial costs through failure to timely file the

---

[24] Mr. Russell's declaration did not address the separate problem of timeliness regarding the memorandum of costs as it related to the Irvine Entities.

[25] Section 473, subdivision (b), provides for two distinct types of relief, commonly differentiated as discretionary and mandatory, from certain actions in the trial court. Under the discretionary relief provision, upon a showing of "mistake, inadvertence, surprise, or excusable neglect," the court has discretion to allow relief from a "judgment,

required memorandum of costs, however, is not a "dismissal" or "default judgment" subject to mandatory relief upon declaration of attorney fault under section 473, subdivision (b). (*Douglas v. Willis, supra*, 27 Cal.App.4th at p. 292 ["[W]hile the Legislature apparently recognized that a plaintiff's loss of potential future gain was serious enough to warrant the extension of mandatory relief [to dismissals of plaintiffs' cases], nothing indicates the Legislature so evaluated a default on the ancillary matter of trial costs. . . . We see nothing to indicate this subject would have provoked the Legislature to make relief mandatory."].) "The range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes 'inexcusable' neglect. But the range of adverse litigation results from which relief can be granted is narrower. Mandatory relief only extends to *vacating* a default which will result in the entry of a default judgment, a default judgment, or an *entered* dismissal." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 616.) Indeed, UDR and the Irvine Entities do not contend on appeal that the trial court erred in refusing to grant mandatory relief.

Although properly denying UDR and the Irvine Entities' request for mandatory relief, on its own motion the trial court exercised its discretion to permit the late filing of the cost bill "for inadvertence or excusable neglect." Relying on *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, Mr. Sanai argues the trial court improperly granted discretionary relief to UDR and the Irvine Entities when only mandatory relief had been requested.[26] In *Luri* Division Five of this court held a motion seeking discretionary relief

---

dismissal, order, or other proceeding . . . taken against" a party or his or her attorney. Under the mandatory relief provision, on the other hand, upon a showing by attorney declaration of "'mistake, inadvertence, surprise, or neglect,' the court shall vacate any 'resulting default judgment or dismissal entered.'" (*Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603, 615-616; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124.)

[26] Although the motion for relief under section 473 was filed more than six months after the filing deadline for the Irvine Entities' memorandum of costs, the statutory six-month period within which to request relief from a procedural time limit does not

under section 473, subdivision (b), accompanied by the declaration of an attorney suggesting attorney fault, does not require the trial court to grant relief under the mandatory provision of that subdivision when there is no request for mandatory relief. (*Id.* at p. 1121.) The court explained, "As a general rule, the trial court may consider only the grounds stated in the notice of motion. [Citations.] An omission in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought. [Citations.] The purpose of these requirements is to cause the moving party to 'sufficiently define the issues for the information and attention of the adverse party and the court.' [Citation.]" (*Id.* at p. 1125.)

UDR and the Irvine Entities respond to Mr. Sanai's argument with the somewhat disingenuous assertion that their motion for relief included a general request for discretionary relief, as well as mandatory relief for attorney fault, because it referred to "Defendants' counsel's mistake, inadvertence, surprise or excusable neglect," the grounds for permissive relief under section 473, subdivision (b).[27] Yet the motion itself, the attorney declaration and the accompanying points and authorities are all phrased entirely in terms of UDR and the Irvine Entities' purported entitlement to mandatory relief based on an attorney's affidavit of fault. Because UDR and the Irvine Entities'

---

commence on the date the deadline is missed. (*Lee v. Wells Fargo Bank, supra,* 88 Cal.App.4th at p. 1196; *Save Our Forest & Ranchlands v. County of San Diego* (1996) 50 Cal.App.4th 1757, 1770.)

[27] In fact, the notice of motion referred to the "excusable neglect of Plaintiffs' counsel," not counsel for UDR and the Irvine Entities. Even without this error, mere boilerplate recitation of the general statutory language without additional reference to the court's discretionary authority under section 473, subdivision (b), in the notice of motion, supporting declarations (an explanation, for example, as to why Mr. Russell's failure to read the rules of court to determine when the costs memorandum was due is "excusable neglect") or memorandum of points and authorities does not provide sufficient notice that discretionary relief is being sought. (See *Tarman v. Shermin* (1961) 189 Cal.App.2d 49, 51-52 ["a long line of authority has held that affidavits accompanying a notice of motion [citations], other documents in the court file [citation], or affidavits and points and authorities filed with the notice [citation], at least when specifically referred to in the notice, may be considered in amplification of the grounds stated in the notice"].)

motion and supporting papers, like the motion in *Luri v. Greenwald, supra*, 107 Cal.App.4th 1119, fail to provide adequate notice that relief is being requested under both the mandatory and discretionary provisions of section 473, subdivision (b),[28] it was error for the trial court to grant the motion on a ground not specified. (*Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1545; *366-388 Geary St., L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1199-1200 [generally only grounds specified in notice of motion may be considered by the trial court]; see *Tarman v. Shermin* (1961) 189 Cal.App.2d 49, 51-52 [notice of motion sufficient if fairly advises of issues to be raised].)

The salutary purpose served by this notice requirement is confirmed in this case: Because UDR and the Irvine Entities' motion for relief was directed only to the mandatory provision in section 473, subdivision (b), Mr. Sanai had no opportunity to argue to the trial court that UDR and the Irvine Entities had failed to satisfy their burden of demonstrating that Mr. Russell's neglect was, in fact, "excusable." (See *Luri v. Greenwald, supra*, 107 Cal.App.4th at p. 1128 [party seeking relief bears the burden of demonstrating that the neglect was excusable].)[29] That argument would have been successful.

A party seeking discretionary relief under section 473, subdivision (b), based on attorney neglect "must demonstrate that such mistake, inadvertence or general neglect was excusable because the negligence of the attorney is imputed to his client and many

---

[28] We recognize that, narrowly read, *Luri v. Greenwald, supra*, 107 Cal.App.4th at page 1125, holds only that the trial court is not obligated to consider grounds for relief not stated in the moving papers, not that it is prohibited from doing so. The rationale for requiring a motion to state the grounds upon which it will be made (§ 1010; rule 311) -- to cause the moving party to provide actual notice of the issues to be decided by the court -- extends equally to the question whether the court may consider a ground for relief not advanced by the moving party. (See *Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1545 ["Only the grounds specified in the notice of motion may be considered by the trial court."].)

[29] We are confident that Mr. Sanai, who has never failed to advance any available argument, would have urged that the showing of "excusable neglect" was deficient had he been on notice that this ground for relief was being considered by the trial court.

not be offered by the latter as a basis for relief." (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399.) Neglect is excusable only if "'a reasonably prudent person under the same or similar circumstances' might have made the same error. [Citations.]" (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.)

"[T]he discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] '*Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable*. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 258, italics added; see *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 895 [conduct falling below the professional standard of care is generally considered inexcusable]; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682 ["The Legislature did not intend to eliminate attorney malpractice claims by providing an opportunity to correct all the professional mistakes an attorney might make in the course of litigating a case."].)

Mr. Russell's mistake in this case, as his declaration makes plain, is that he assumed he had 60 days to file UDR and the Irvine Entities' memorandum of costs from the date of the notice of entry of final judgment, an error caused by his failure to review the rules of court to determine the easily ascertainable matter of the deadline for filing the document (see *Anderson v. Sherman* (1981) 125 Cal.App.3d 228, 238). That is not the mere "inadvertent entry of a wrong date," which might warrant discretionary relief (*Haviland v. Southern California Edison Co.* (1916) 172 Cal. 601, 605), but rather conduct falling below the professional standard of care.[30] Counsel's failure to file a

---

[30] "The client's redress for inexcusable neglect by counsel is, of course, an action for malpractice. [Citations.]" (*Carroll v. Abbott Laboratories, Inc., supra,* 32 Cal.3d at p. 898.)

timely costs memorandum, therefore, was not the result of excusable neglect; discretionary relief under section 473, subdivision (b), even if a request for such relief had been properly noticed, would be improper. (*Zamora v. Clayborn Contracting Group, Inc., supra*, 28 Cal.4th at p. 258.)

4. *The Trial Court Properly Denied UDR Fees Under the Attorney Fee Provision of the Lease Agreement*

Paragraph 26(E) of the original, August 26, 1997 lease agreement between Mr. Sanai and Irvine Apartment Communities, L.P. provides, "In the event either Landlord or Resident shall bring any action in connection herewith, the party prevailing therein shall be entitled to recover as part of such action, reasonable attorneys' fees, costs of collection, expert witness fees, court costs and other legal costs." The trial court denied UDR's request for fees under this provision, finding, "The lease permits recovery of fees by the prevailing party in connection with the lease, which the court interprets to mean an action to enforce the parties' rights under the lease. This lawsuit was not brought to enforce rights under the lease agreement." We agree as to the causes of action asserted by Mr. Sanai against UDR.[31] Although UDR's cross-complaint against Mr. Sanai, as assignee of the Irvine Entities, did seek to enforce rights under the lease agreement, Civil Code section 1717, subdivision (b)(2), expressly precludes any award of fees under the circumstances of this case.

a. *Civil Code section 1717*

"If a cause of action is 'on a contract,' and the contract provides that the prevailing party shall recover attorney[] fees incurred to enforce the contract, then attorney[] fees must be awarded on the contract claim in accordance with Civil Code section 1717."

---

[31] The trial court denied the Irvine Entities' request for attorney fees on the same ground. As explained in section 2 of discussion of this opinion, the Irvine Entities failed to file a timely motion for attorney fees. Accordingly, we affirm the court's denial of fees without deciding whether the attorney fee provision of the lease agreement would otherwise authorize recovery of fees as to one or more of the claims asserted by Mr. Sanai against the Irvine Entities.

(*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706.) Civil Code section 1717[32] does not apply to tort claims; it determines which party, if any, is entitled to attorney fees on a contract claim only. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 615 ["section 1717 applies only to actions that contain at least one contract claim. [Citations.] If an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims."]; *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.)

None of Mr. Sanai's claims against UDR was "on a contract": Mr. Sanai asserted UDR's negative reports about his credit standing were defamatory and otherwise tortious and also violated California law regulating consumer credit reporting agencies; but, with the exception of the ninth cause of action, which did not name UDR as a defendant, he did not seek in any way to enforce the bargain-priced lease extension he had allegedly accepted on October 1, 1998. Accordingly, UDR is not entitled to attorney fees under Civil Code section 1717 with respect to Mr. Sanai's complaint.

In contrast to the complaint, UDR's cross-complaint, filed as assignee of Irvine Apartment Communities, L.P.'s claims against Mr. Sanai, asserted causes of action for breach of the lease agreement and for declaratory relief regarding the lease, as well as common counts and a claim for fraud. Had UDR prevailed on summary judgment or at trial on its contract claims, it would have been entitled to attorney fees under Civil Code section 1717. However, Civil Code section 1717, subdivision (b)(2), provides: "Where an action has been voluntarily dismissed or dismissed pursuant to settlement of the case, there shall be no prevailing party for purposes of this section." That is exactly what occurred in this case: Mr. Sanai tendered the full amount of damages claimed by UDR;

---

[32] Civil Code section 1717, subdivision (a), provides, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

UDR accepted the tender and voluntarily dismissed its claim. Accordingly, UDR is not a "prevailing party" and is not entitled to attorney fees under Civil Code section 1717 on its own cross-complaint.

Relying on *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, UDR argues there is a nonstatutory exception to Civil Code section 1717, subdivision (b)(2), for a party that has voluntarily dismissed its cross-complaint because it achieved its primary litigation goals by prevailing on the complaint and the time and expense in pursing the cross-complaint are not commensurate with the additional relief that could be obtained. (See *Pacific Custom Pools, Inc.*, at pp. 1272-1273.) Although UDR's interpretation of *Pacific Custom Pools* seems overly broad, even as framed by UDR the exception is inapplicable here. While it may be true that UDR accomplished its primary litigation objectives when it prevailed on the noncontract claims asserted against it, UDR dismissed its cross-complaint only when Mr. Sanai tendered a sum deemed satisfactory to UDR. Unlike the Turner Construction Company, the "prevailing party" in *Pacific Custom Pools*, therefore, UDR did not dismiss its cross-complaint simply because of the time and expense that would have been incurred in pursuing its claims. UDR effectively settled its claim against Mr. Sanai, and its voluntary dismissal falls squarely within the plain language of Civil Code section 1717, subdivision (b)(2), precluding an award of attorney fees.

b. *Fees on tort claims*

Although Civil Code section 1717 does not apply to tort claims, parties may agree that the prevailing party in any litigation between them, whether involving contract or noncontract claims, is to recover attorney fees. "[A] broadly phrased contractual attorney fee provision may support an award to the prevailing party in a tort action. '"'[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.'"' [Citation.]" (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 743.) "The court must determine whether the contract provides for attorney fees in a tort action under the

procedural posture of the particular case." (*Ibid.*; see *Exxess Electronixx v. Heger Realty Corp., supra,* 64 Cal.App.4th at p. 709.)

The language in the attorney fee provision of the lease agreement ("[i]n the event either Landlord or Resident shall bring any action in connection herewith") is sufficiently broad to include tort and other noncontractual actions relating to the lease. (See, e.g., *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799 [contract providing for attorney fees in any action "relating to the demised premises" encompasses tort actions]; *Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1831 [same holding when fee provision covered actions "relating to" the contract]; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 [same holding when fee provision covered actions to which "this Agreement gives rise"].)[33] Although tort and statutory claims arising from reports to credit agencies that Mr. Sanai allegedly failed to pay rent appear to fall within the scope of the contractual fee provision, UDR is not a party to the lease agreement or any other contract with Mr. Sanai providing for attorney fees. Nor is there any indication Mr. Sanai and Irvine Apartment Communities, L.P. intended to benefit UDR by including it within their contractual attorney fee clause. (*Sessions Payroll Management, Inc. v. Noble Construction Co*. (2000) 84 Cal.App.4th 671, 680 ["'A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him. [Citations.] As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler. . . .'"]; see *Whiteside v. Tenet Healthcare Corp.* (2002) 101 Cal.App.4th 693, 708-709.) In short, there is no contractual basis for an award of fees in favor of UDR. (See *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 544-

---

[33] We independently determine as a question of law the scope of an attorney fee provision if, as here, the interpretation of the provision does not turn on extrinsic evidence. (*Kalai v. Gray* (2003) 109 Cal.App.4th 768, 777; *Excess Electronixx v. Heger Realty Corp., supra,* 64 Cal.App.4th at p. 705.)

545 [attorney fees are recoverable only if the lawsuit involves a claim covered by a contractual attorney fee clause and is between the parties to that contract].)

5. *The Trial Court Erred in Awarding UDR Fees under the Consumer Credit Reporting Agencies Act*

a. *The act's asymmetrical attorney fee provision*

The Consumer Credit Reporting Agencies Act was adopted to ensure that consumer credit reporting agencies operate "with fairness, impartiality, and a respect for the consumer's right to privacy" by requiring those agencies to "adopt reasonable procedures for meeting the needs of commerce for consumer credit, . . . in a manner which is fair and equitable to the customer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . ." (Civ. Code, § 1785.1, subds. (c) & (d).) The act has separate provisions defining the obligations of consumer credit reporting agencies (Civ. Code, § 1785.10 et seq.), requirements for users of consumer credit reports (Civ. Code, § 1785.20 et seq.) and obligations imposed on furnishers of credit information (Civ. Code, § 1785.25 et seq.).

Civil Code section 1785.31, subdivision (a), authorizes a consumer[34] to file an action for damages "as a result of a violation of [the act] by any person." Prior to its amendment in 1999, Civil Code section 1785.31, subdivision (d), authorized the award of attorney fees to the prevailing party in such an action, whether plaintiff or defendant: "The prevailing parties in any action commenced under this section shall be entitled to recover court costs and reasonable attorney's fees. . . ." (Former Civ. Code, § 1785.31, subd. (d), added by Stats. 1976, ch. 666, § 12, pp. 1644-1645, as amended by Stats. 1997, ch. 768, § 4; see *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 577.)

Assembly Bill No. 758 (1999-2000 Reg. Sess.) initially proposed amending Civil Code section 1785.31, subdivision (d), to eliminate any right for a credit company sued under the act to recover attorney fees by restricting the entitlement to costs and

---

[34] Civil Code section 1785.3, subdivision (b), provides, "'Consumer' means a natural individual."

reasonable attorney fees to the "prevailing plaintiffs." As explained in the report by the Assembly Committee on the Judiciary on Assembly Bill No. 758 (1999-2000 Reg. Sess.), as amended on April 19, 1999, "This change comports with the objectives of California's Consumer Credit Reporting Agencies Act to protect consumers from improper actions by credit companies. Under the current approach, allowing both plaintiffs and defendants to be vulnerable to paying the attorney's fees and costs of their opponents discourages victims from pursing their rights. The threat, even remote, of having to pay a defendant's legal fees likely stifles many cases from ever being brought."

Opponents of this proposed amendment argued that a prevailing defendant should at least be entitled to recover attorney fees if the action was brought in bad faith or for purposes of harassment, as provided in the comparable provisions of the federal Fair Credit Reporting Act (15 U.S.C. §§ 1681n(c), 1681o(b)). (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 758 (1999-2000 Sess.) April 27, 1999.) The amendment's supporters asserted that such a provision was unnecessary "because California law already allows sanctions for frivolous complaints or pleadings." (*Ibid*.)

In response to the concern advanced by the amendment's opponents, Assembly Bill No. 758 was further amended in the Senate to provide limited exceptions to the proposed prevailing-plaintiffs-only provision for attorney fees. First, on August 17, 1999 a new provision (which ultimately became Civ. Code, § 1785.31, subd. (g)) was included in the legislation to provide: "Nothing in this section is intended to affect remedies available under Section 128.5 of the Code of Civil Procedure." Then, on September 2, 1999 a new subdivision (e) was proposed that would provide: "If a plaintiff brings an action pursuant to this section against a debt collector, as defined in subdivision (c) of Section 1788.2, and the basis for the action is related to the collection of a debt, whether issues relating to the debt collection are raised in the same or another proceeding, the debt collector shall be entitled to recover reasonable attorney's fees upon a finding by the court that the action was not brought in good faith." The report of the Senate Judiciary Committee on Assembly Bill No. 758 (1999-2000 Reg. Sess.), as amended on

September 2, 1999, explained: "This bill would limit the recovery of those [court] costs and [attorney] fees to the prevailing plaintiffs, except as otherwise specified. The bill would also permit a debt collector to recover reasonable attorney's fees against a plaintiff who brings an action against the debt collector to recover damages for a negligent or willful violation of the act, where the basis for the action is related to the collection of a debt and the court finds that the action was not brought in good faith."

The September 2, 1999 version of Assembly Bill No. 785, with its asymmetrical provision for the award of attorney fees, was enacted into law. (Stats. 1999, ch. 836, § 1,.) Accordingly, although plainly the prevailing party with respect to the two causes of action in the second amended complaint alleging violations of the Consumer Credit Reporting Agencies Act,[35] UDR is entitled to an award of fees only if (i) UDR is a "debt collector" as defined in Civil Code section 1788.2, subdivision (c); (ii) the basis for Mr. Sanai's claims against UDR under the act "is related to the collection of a debt"; and (iii) the action was not brought in good faith. (Civ. Code, § 1785.31, subd. (e).)

b. *The trial court's award of fees to UDR was improper*

Finding Mr. Sanai had not brought this action in good faith,[36] the trial court awarded UDR $136,034 in fees, 25 percent of the total fees sought by all defendants in

---

[35] The seventh cause of action in the second amended complaint alleged UDR, Mr. Saltz and the Irvine Entities intentionally furnished inaccurate statements to major consumer credit reporting agencies about the debt Mr. Sanai purportedly owed for unpaid rent on the Promontory Point apartment. The eighth cause of action alleged UDR is itself a consumer credit reporting agency and failed to comply with the requirements of Civil Code section 1785.16, subdivision (f), regarding reinvestigation of disputes as to the completeness or accuracy of information in its files.

[36] The trial court commented: "Plaintiff has proliferated needless, baseless pleadings that now occupy about 15 volumes of Superior Court files, not to mention the numerous briefs submitted in the course of the forays into the Court of Appeal and attempts to get before the Supreme Court, and not one pleading appears to have had substantial merit. The genesis of this lawsuit, and the unwarranted grief and expense it has spawned, are an outrage."

their consolidated attorney fee motion, pursuant to Civil Code section 1785.31, subdivision (e). We reverse the award on two grounds.

First, the debt at issue did not arise from a "consumer credit transaction"; accordingly, UDR was not a "debt collector" as that term is used in Civil Code section 1788.2. Civil Code section 1788.2, subdivision (c), defines "debt collector" as one who, "in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." "Debt collection," in turn, is defined as "any act or practice in connection with the collection of consumer debts." (Civ. Code, § 1788.2, subd. (b).) The term "consumer debt" is then defined as "money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction." (Civ. Code, § 1788.2, subd. (f).) Finally, "consumer credit transaction" means "a transaction between a natural person and another person in which property, services or money is acquired on credit by that natural person from such other person primarily for personal, family, or household purposes." (Civ. Code, § 1788.2, subd. (e); see *Gouskos v. Aptos Village Garage, Inc*. (2001) 94 Cal.App.4th 754, 759 [under Civ. Code, § 1788.2, subd. (e), "'a consumer credit transaction' means a transaction where a natural person *acquires* property or services on *credit*."].)

UDR and the Irvine Entities steadfastly maintained that, once the original six-month term of the August 1997 lease agreement expired, Mr. Sanai occupied the Promontory Point apartment as a month-to-month tenant at a monthly rent of $2,165 until he left in January 1999.[37] The debt allegedly due from Mr. Sanai was the difference, for a period of slightly less than four months, between that $2,165 monthly rent and the payment of $1,410 per month actually made by Mr. Sanai in accordance with the terms of the lease extension agreement he claimed to have accepted on October 1, 1998. Pursuant to paragraph 29 of the original lease agreement, the terms and conditions of the original

---

[37] The provision in the lease agreement converting Mr. Sanai's occupancy of the apartment to a month-to-month tenancy upon expiration of the original lease term is quoted in footnote 2, above.

lease continued with respect to the month-to-month tenancy, including the obligation "to pay landlord rent for the Premises each month in advance on or before Rent Due Date."[38] Accordingly, once the original lease had expired, the landlord did not extend any credit to Mr. Sanai: Mr. Sanai was obligated to pay on the first day of each month for his occupancy of the apartment during that month. Mr. Sanai's on-going, month-to-month tenancy was not a consumer credit transaction, and the claim against him for unpaid rent was not a "consumer debt" subject to collection by a "debt collector."

Second, the basis for Mr. Sanai's lawsuit against UDR was not related to the collection of a debt, as required for an award of fees under Civil Code section 1785.31, subdivision (e). The original complaint in this matter alleged UDR had violated the Consumer Credit Reporting Agencies Act not by its efforts to collect unpaid rent due the Irvine Entities but by *falsely* reporting that active collection efforts were ongoing to collect the amount claimed to be due from him. The second amended complaint contained similar allegations. Indeed, although the Irvine Entities requested that UDR notify the major consumer credit reporting agencies of its claim for unpaid rent shortly after Mr. Sanai left his Promontory Point apartment, no legal or other action of any sort was initiated to enforce that claim. Only after the trial court ruled Mr. Sanai's former landlord was a necessary and indispensable party to his action and Mr. Sanai amended the complaint to add a claim for breach of a written lease agreement did UDR, as assignee of Irvine Apartment Communities, L.P., attempt to enforce the claim for unpaid rent. Thus, whether or not initiated and pursued in bad faith, Mr. Sanai's action against UDR does not fall within the narrow exception created in 1999 to the general rule that only prevailing plaintiffs are entitled to fees under the Consumer Credit Reporting Agencies Act.

---

[38] Paragraph 1(E) of the original lease defined "rent due date" as "the first (1st) day of each calendar month."

DISPOSITION

The postjudgment orders awarding costs to UDR and the Irvine Entities and attorney fees to UDR under the Consumer Credit Reporting Agencies Act are reversed. The order denying attorney fees to UDR and the Irvine Entities under the terms of the parties' lease agreement is affirmed. Each party is to bear his or its own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.